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9 KAWASAKI KISEN KAISHA, LTD. and
10 "K" LINE AMERICA, INC.

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA

13 THE CONTINENTAL INSURANCE
14 COMPANY, a corporation,

15 Plaintiff,

16 vs.

17 KAWASAKI KISEN KAISHA, LTD.
18 D/B/A "K" LINE, a foreign
19 corporation; "K" LINE AMERICA,
20 INC., a foreign corporation; and DOE
21 ONE through DOE TEN,

22 Defendants.

CASE NO.

007-06148

ANSWER TO COMPLAINT

23 COMES NOW Defendants Kawasaki Kisen Kaisha, Ltd. and "K"
24 Line America, Inc. (hereinafter collectively "Defendants") and as an answer to the
25 Complaint of The Continental Insurance Company (hereinafter "Plaintiff"), admit,
26 deny and allege as follows:

27 **GENERAL ALLEGATIONS**

28 1. Answering Paragraph 1 of said Complaint, Defendants have
neither information nor belief on the subject sufficient to enable them to answer
the allegations contained therein, and, basing their denial on that ground, deny
generally and specifically, each and every, all and singular the allegations of said

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RICHARD W. WEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

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1 paragraph.

2 2. Answering Paragraph 2 of said Complaint, Defendants admit
3 that Kawasaki Kisen Kaisha, Ltd. is a foreign corporation organized and existing
4 under the laws of Japan and is engaged in the business of carrying goods for hire,
5 and that "K" Line America, Inc. is a domestic corporation which acts as the agent
6 of Kawasaki Kisen Kaisha, Ltd. in the United States. Except as expressly
7 admitted, Defendants deny generally and specifically, each and every, all and
8 singular the allegations of said paragraph.

9 3. Answering Paragraph 3 of said Complaint, Defendants have
10 neither information nor belief on the subject sufficient to enable them to answer
11 the allegations contained therein, and, basing their denial on that ground, deny
12 generally and specifically, each and every, all and singular the allegations of said
13 paragraph.

14 **FIRST CAUSE OF ACTION**

15 **(Breach of Contract against KAWASAKI KISEN KAISHA, LTD. D/B/A "K"**
16 **LINE, "K" LINE AMERICA, INC., and DOE ONE through DOE TEN)**

17 4. Defendants refer to and incorporate by reference as though set
18 forth herein, their answers to paragraphs 1 through 3 above.

19 5. Answering Paragraph 5 of said Complaint, Defendants admit
20 that in or about September 2006, at Oakland, California, shipment of plums were
21 received by Kawasaki Kisen Kaisha, Ltd. for carriage to Hong Kong in accordance
22 with the terms and conditions of certain bills of lading issued by Kawasaki Kisen
23 Kaisha, Ltd. Except as expressly admitted, Defendants deny generally and
24 specifically, each and every, all and singular the allegations of said paragraph.

25 6. Answering Paragraph 6 of said Complaint, Defendants deny
26 generally and specifically, each and every, all and singular the allegations of said
27 paragraph.

28 7. Answering Paragraph 7 of said Complaint, Defendants have

1 neither information nor belief on the subject sufficient to enable them to answer
2 the allegations contained therein, and, basing their denial on that ground, deny
3 generally and specifically, each and every, all and singular the allegations of said
4 paragraph.

5 **SECOND CAUSE OF ACTION**

6 **(Bailment against KAWASAKI KISEN KAISHA, LTD. D/B/A "K" LINE,
7 "K" LINE AMERICA, INC., and DOE ONE through DOE TEN)**

8 8. Defendants refer to and incorporate by reference as though set
9 forth herein, their answers to paragraphs 1 through 7 above.

10 9. Answering Paragraph 9 of said Complaint, Defendants deny
11 generally and specifically, each and every, all and singular the allegations of said
12 paragraph.

13 10. Answering Paragraph 10 of said Complaint, Defendants admit
14 that in or about September 2006, at Oakland, California, shipment of plums were
15 received by Kawasaki Kisen Kaisha, Ltd. for carriage to Hong Kong in accordance
16 with the terms and conditions of certain bills of lading issued by Kawasaki Kisen
17 Kaisha, Ltd. Except as expressly admitted, Defendants deny generally and
18 specifically, each and every, all and singular the allegations of said paragraph.

19 11. Answering Paragraph 11 of said Complaint, Defendants deny
20 generally and specifically, each and every, all and singular the allegations of said
21 paragraph.

22 12. Answering Paragraph 12 of said Complaint, Defendants have
23 neither information nor belief on the subject sufficient to enable them to answer
24 the allegations contained therein, and, basing their denial on that ground, deny
25 generally and specifically, each and every, all and singular the allegations of said
26 paragraph.

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THIRD CAUSE OF ACTION

(Breach of Ca. C.C. § 2194 against KAWASAKI KISEN KAISHA, LTD. D/B/A "K" LINE, "K" LINE AMERICA, INC., and DOE ONE through DOE TEN)

13. Defendants refer to and incorporate by reference as though set forth herein, their answers to paragraphs 1 through 12 above.

14. Answering Paragraph 14 of said Complaint, Defendants deny generally and specifically, each and every, all and singular the allegations of said paragraph.

15. Answering Paragraph 15 of said Complaint, Defendants admit that in or about September 2006, at Oakland, California, shipment of plums were received by Kawasaki Kisen Kaisha, Ltd. for carriage to Hong Kong in accordance with the terms and conditions of certain bills of lading issued by Kawasaki Kisen Kaisha, Ltd. Except as expressly admitted, Defendants deny generally and specifically, each and every, all and singular the allegations of said paragraph.

16. Answering Paragraph 16 of said Complaint, Defendants deny generally and specifically, each and every, all and singular the allegations of said paragraph.

17. Answering Paragraph 17 of said Complaint, Defendants have neither information nor belief on the subject sufficient to enable them to answer the allegations contained therein, and, basing their denial on that ground, deny generally and specifically, each and every, all and singular the allegations of said paragraph.

FOURTH CAUSE OF ACTION

(Negligence against KAWASAKI KISEN KAISHA, LTD. D/B/A "K" LINE, "K" LINE AMERICA, INC., and DOE ONE through DOE TEN)

18. Defendants refer to and incorporate by reference as though set forth herein, their answers to paragraphs 1 through 17 above.

19. Answering Paragraph 19 of said Complaint, Defendants deny

1 generally and specifically, each and every, all and singular the allegations of said
2 paragraph.

3 20. Answering Paragraph 20 of said Complaint, Defendants admit
4 that in or about September 2006, at Oakland, California, shipment of plums were
5 received by Kawasaki Kisen Kaisha, Ltd. for carriage to Hong Kong in accordance
6 with the terms and conditions of certain bills of lading issued by Kawasaki Kisen
7 Kaisha, Ltd. Except as expressly admitted, Defendants deny generally and
8 specifically, each and every, all and singular the allegations of said paragraph.

9 21. Answering Paragraph 21 of said Complaint, Defendants deny
10 generally and specifically, each and every, all and singular the allegations of said
11 paragraph.

12 22. Answering Paragraph 22 of said Complaint, Defendants have
13 neither information nor belief on the subject sufficient to enable them to answer
14 the allegations contained therein, and, basing their denial on that ground, deny
15 generally and specifically, each and every, all and singular the allegations of said
16 paragraph.

17 **FURTHER ANSWERING SAID COMPLAINT**
18 **AND AS A FIRST AFFIRMATIVE DEFENSE**
19 **TO EACH AND EVERY CAUSE OF ACTION**
20 **THEREIN, DEFENDANTS ALLEGE:**

21 23. Plaintiff's Complaint, and each and every cause of action
22 therein, fails to state a claim upon which relief may be granted against Defendants.

23 **FURTHER ANSWERING SAID COMPLAINT**
24 **AND AS A SECOND AFFIRMATIVE DEFENSE**
25 **TO EACH AND EVERY CAUSE OF ACTION**
26 **THEREIN, DEFENDANTS ALLEGE:**

27 24. If any loss or damage did occur to said cargo, none of said loss
28 or damage was caused or contributed to by any fault or neglect on the part of

1 Defendants but from a cause or causes from which they are expressly exempted
 2 from responsibility by the terms and conditions of a bill of lading issued by
 3 Kawasaki Kisen Kaisha, Ltd., by the terms and conditions of any other contracts
 4 governing the carriage, and under any applicable tariffs of Kawasaki Kisen
 5 Kaisha, Ltd. Defendants claim the benefit of each and every provision contained
 6 in said bill of lading, any other contracts governing the carriage, and in any
 7 applicable tariffs, and beg leave to amend this answer and to offer proof thereof
 8 when more fully advised of the details concerning said loss or damage.

9 **FURTHER ANSWERING SAID COMPLAINT**
 10 **AND AS A THIRD AFFIRMATIVE DEFENSE**
 11 **TO EACH AND EVERY CAUSE OF ACTION**
 12 **THEREIN, DEFENDANTS ALLEGE:**

13 25. An act of Congress entitled "the Carriage of Goods by Sea
 14 Act," 46 U.S.C. 1300, et seq., is, by its terms applicable to the contracts of carriage
 15 and bills of lading.

16 26. Defendants claim the benefit of each and every provision of
 17 COGSA. Defendants are not presently advised fully of the nature and cause of the
 18 alleged loss or damage to said goods, if any, but beg leave to amend this answer
 19 when more fully advised, and to offer proof accordingly.

20 **FURTHER ANSWERING SAID COMPLAINT**
 21 **AND AS A FOURTH AFFIRMATIVE DEFENSE**
 22 **TO EACH AND EVERY CAUSE OF ACTION**
 23 **THEREIN, DEFENDANTS ALLEGE:**

24 27. Said Carriage of Goods by Sea Act provides in part as follows:

25 "1304(2) Neither the carrier nor the
 26 ship shall be responsible for loss or damage
 27 arising or resulting from –

28 "(i) Act or omission of the shipper or

1 owner of the goods, his agent or
2 representative.”

3 Defendants are informed and believe and on such information and belief allege
4 that the damage to said cargo, if any, arose or resulted from an act or omission of
5 the shipper or owner of the goods, his agent or representative.

6 **FURTHER ANSWERING SAID COMPLAINT**
7 **AND AS A FIFTH AFFIRMATIVE DEFENSE**
8 **TO EACH AND EVERY CAUSE OF ACTION**
9 **THEREIN, DEFENDANTS ALLEGE:**

10 28. Said Carriage of Goods by Sea Act provides in part as follows:

11 “1304(2) Neither the carrier nor the
12 ship shall be responsible for loss or damage
13 arising or resulting from –

14 “(m) Wastage in bulk or weight or
15 any other loss damage arising from inherent
16 defect, quality or vice of the goods.”

17 Defendants are informed and believe and on such information and belief allege
18 that the damage to said cargo, if any, arose or resulted from inherent defect,
19 quality or vice of cargo.

20 **FURTHER ANSWERING SAID COMPLAINT**
21 **AND AS A SIXTH AFFIRMATIVE DEFENSE**
22 **TO EACH AND EVERY CAUSE OF ACTION**
23 **THEREIN, DEFENDANTS ALLEGE:**

24 29. Said Carriage of Goods by Sea Act provides in part as follows:

25 “1304(2) Neither the carrier nor the
26 ship shall be responsible for loss or damage
27 arising or resulting from –

28 “(n) Insufficiency of packing.”

1 Defendants are informed and believe, and on such information and belief allege
2 that the damage to said cargo, if any arose or resulted from insufficiency of
3 packing.

4 **FURTHER ANSWERING SAID COMPLAINT**
5 **AND AS A SEVENTH AFFIRMATIVE DEFENSE**
6 **TO EACH AND EVERY CAUSE OF ACTION**
7 **THEREIN, DEFENDANTS ALLEGE:**

8 30. Said Carriage of Goods by Sea Act provides in part as follows:

9 "1304(2) Neither the carrier nor the ship shall
10 be responsible for loss or damage arising or resulting
11 from –

12 "(d) Act of God."

13 Defendants are informed and believe, and on such information and belief allege
14 that the damage to said cargo, if any, arose or resulted from an act of God.

15 **FURTHER ANSWERING SAID COMPLAINT**
16 **AND AS AN EIGHTH AFFIRMATIVE DEFENSE**
17 **TO EACH AND EVERY CAUSE OF ACTION**
18 **THEREIN, DEFENDANTS ALLEGE:**

19 31. Said Carriage of Goods by Sea Act provides in part as follows:

20 "1304(2) Neither the carrier nor the
21 ship shall be responsible for loss or damage
22 arising or resulting from –

23 "(p) Latent defects not discovered by
24 due diligence . . ."

25 Defendants are informed and believe, and on such information and belief allege
26 that the damage to said cargo, if any, arose or resulted from latent defects not
27 discovered by due diligence.

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FURTHER ANSWERING SAID COMPLAINT
AND AS AN NINTH AFFIRMATIVE DEFENSE
TO EACH AND EVERY CAUSE OF ACTION
THEREIN, DEFENDANTS ALLEGE:

32. Said Carriage of Goods by Sea Act provides in part as follows:

“1304(2) Neither the carrier nor the ship
shall be responsible for loss or damage arising or
resulting from –

“(q) Any other cause arising
without the actual privity of the
carrier and without the fault or
negligence of the agents or
servants of the carrier....”

Defendants are informed and believe and on such information and belief allege
that the damage to said cargo, if any, arose or resulted from a cause or causes
arising without the actual fault and privity of Defendants and without the fault or
neglect of agents or servants of the carrier.

FURTHER ANSWERING SAID COMPLAINT
AND AS A TENTH AFFIRMATIVE DEFENSE
TO EACH AND EVERY CAUSE OF ACTION
THEREIN, DEFENDANTS ALLEGE:

33. Said Carriage of Goods by Sea Act provides in part as follows:

“1303(6) Unless notice of loss or damage and
the general nature of such loss or damage be given in
writing to the carrier or his agent at the port of discharge
before or at the time of the removal of the goods into
custody of the person entitled to delivery thereof under
the contract of carriage, such removal shall be prima

1 facie evidence of the delivery by the carrier of the goods
2 as described in the bill of lading. If the loss or damage is
3 not apparent, the notice must be given within three days
4 of the delivery.”

5 Defendants are informed and believe, and on such information and belief allege
6 that notice of the loss or damage alleged in the complaint was not given in
7 accordance with the aforesaid provisions of the Act.

8 **FURTHER ANSWERING SAID COMPLAINT**
9 **AND AS AN ELEVENTH AFFIRMATIVE DEFENSE**
10 **TO EACH AND EVERY CAUSE OF ACTION**
11 **THEREIN, DEFENDANTS ALLEGE:**

12 34. Said Carriage of Goods by Sea Act provides in part as follows:
13 “1306(6) . . .

14 In any event the carrier and the ship shall be
15 discharged from all liability in respect of loss or damage
16 unless suit is brought within one year after delivery of
17 the goods or the date when the goods should have been
18 delivered.”

19 Defendants are informed and believe, and on such information and belief allege
20 that cargo was delivered more than one year before the institution of this suit and
21 said suit is, therefore, time-barred and these Defendant carriers are accordingly
22 discharged from all liability herein. Defendants beg leave to amend this answer
23 when more fully advised and to offer proof accordingly.

24 **FURTHER ANSWERING SAID COMPLAINT**
25 **AND AS A TWELFTH AFFIRMATIVE DEFENSE**
26 **TO EACH AND EVERY CAUSE OF ACTION**
27 **THEREIN, DEFENDANTS ALLEGE:**

28 35. Said Carriage of Goods by Sea Act provides in part as follows:

1 “1304(5) Neither the carrier nor the ship
2 shall in any event be or become liable for any loss
3 or damage to or in connection with the
4 transportation of goods in an amount exceeding
5 \$500 per package lawful money of the United
6 States or in the case of goods not shipped in
7 packages, per customary freight unit, or the
8 equivalent of that sum in other currency, unless
9 the nature and value of such goods have been
10 declared by the shipper before the shipment and
11 inserted in the bill of lading. This declaration, if
12 embodied in the bill of lading, shall be prima facie
13 evidence, but shall not be conclusive on the
14 carrier....”

15 Defendants are informed and believe and on such information and belief allege
16 that Defendants’ liability, if any, is limited to \$500 per package or customary
17 freight unit pursuant to COGSA and the terms of the bill of lading.

18 **FURTHER ANSWERING SAID COMPLAINT**
19 **AND AS A THIRTEENTH AFFIRMATIVE DEFENSE**
20 **TO EACH AND EVERY CAUSE OF ACTION**
21 **THEREIN, DEFENDANTS ALLEGE:**

22 36. Plaintiff, its agent and representatives and/or predecessors-in-
23 interest did not exercise ordinary care, caution or prudence to avoid the alleged
24 loss and that the alleged loss, if any, sustained by Plaintiff was proximately caused
25 and contributed by the negligence and fault of Plaintiff, its agents or
26 representatives and/or predecessors-in-interest. Said negligence and fault bars
27 Plaintiff’s recovery from these answering Defendants or comparatively reduces the
28 percentage of fault, if any, of these answering Defendants.

FURTHER ANSWERING SAID COMPLAINT
AND AS A FOURTEENTH AFFIRMATIVE DEFENSE
TO EACH AND EVERY CAUSE OF ACTION
THEREIN, DEFENDANTS ALLEGE:

37. Defendants are informed and believe and thereupon allege that the alleged damage, if any, was caused by the fault and neglect of third parties for whom these answering Defendants are not responsible or liable. Said fault and neglect comparatively reduces the percentage of fault, if any, of these answering Defendants.

FURTHER ANSWERING SAID COMPLAINT
AND AS A FIFTEENTH AFFIRMATIVE DEFENSE
TO EACH AND EVERY CAUSE OF ACTION
THEREIN, DEFENDANTS ALLEGE:

38. Plaintiff and/or its predecessors-in-interest failed to mitigate its damages and its claim should be accordingly reduced.

FURTHER ANSWERING SAID COMPLAINT
AND AS A SIXTEENTH AFFIRMATIVE DEFENSE
TO EACH AND EVERY CAUSE OF ACTION
THEREIN, DEFENDANTS ALLEGE:

39. The claims against Defendants should be dismissed because they are subject to the forum selection clause of the bill of lading requiring that all disputes be resolved in the Tokyo District Court.

FURTHER ANSWERING SAID COMPLAINT
AND AS A SEVENTEENTH AFFIRMATIVE DEFENSE
TO EACH AND EVERY CAUSE OF ACTION
THEREIN, DEFENDANTS ALLEGE:

40. "K" Line America, Inc. is the agent of a disclosed principal, Kawasaki Kisen Kaisha, Ltd., and therefore is not liable for the alleged damages.

1 **FURTHER ANSWERING SAID COMPLAINT**
2 **AND AS AN EIGHTEENTH AFFIRMATIVE DEFENSE**
3 **TO EACH AND EVERY CAUSE OF ACTION**
4 **THEREIN, DEFENDANTS ALLEGE:**

5 41. “K” Line America, Inc. was not the bill of lading carrier, the
6 shipowner or operator of the vessel and did not carry the cargo.

7 **FURTHER ANSWERING SAID COMPLAINT**
8 **AND AS A NINETEENTH AFFIRMATIVE DEFENSE**
9 **TO EACH AND EVERY CAUSE OF ACTION**
10 **THEREIN, DEFENDANTS ALLEGE:**

11 42. Plaintiff’s recovery, if any, is barred by the doctrine of
12 estoppel.

13 **FURTHER ANSWERING SAID COMPLAINT**
14 **AND AS A TWENTIETH AFFIRMATIVE DEFENSE**
15 **TO EACH AND EVERY CAUSE OF ACTION**
16 **THEREIN, DEFENDANTS ALLEGE:**
17 43. Plaintiff’s recovery, if any, is barred by the doctrine of waiver.
18 **FURTHER ANSWERING SAID COMPLAINT**
19 **AND AS A TWENTY-FIRST AFFIRMATIVE DEFENSE**
20 **TO EACH AND EVERY CAUSE OF ACTION**
21 **THEREIN, DEFENDANTS ALLEGE:**

22 44. Each and every cause of action asserted by Plaintiff is barred
23 by Plaintiff’s consent.

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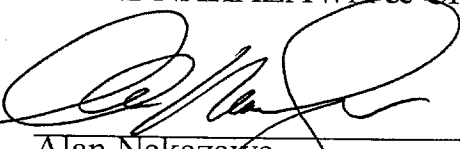
28 //

PRAYER

WHEREFORE, Defendants pray that Plaintiff take nothing by said Complaint and that said Complaint be dismissed and that they have and recover their costs of suit herein, and for such other and further relief as may be just.

Dated: November 30, 2007 COGSWELL NAKAZAWA & CHANG, LLP

By



Alan Nakazawa
Dena S. Aghabeg
Attorneys for Defendants KAWASAKI
KISEN KAISHA, LTD. and "K" LINE
AMERICA, INC.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 444 West Ocean Boulevard, Suite 1250, Long Beach, CA 90802-8131.

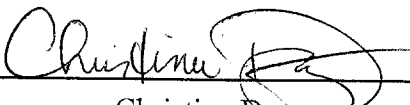
On December 5, 2007, I will serve the foregoing document described as: **ANSWER TO COMPLAINT** on the interested parties in this action, by placing the () original (x) true copy thereof enclosed in sealed envelope to the addressee as follows:

Jonathan W. Thames
ARCHER NORRIS
2033 N. Main Street, #800
Walnut Creek, CA 94596

Tel: (925) 930-6600
Fax: (925) 930-6620
Attorney for Plaintiff The Continental
Insurance Company

- (X) **by mail** as follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing, which is deposited with U.S. Postal Service on that same day with postage thereon fully prepared at Long Beach, CA in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- () **by personal service** as follows: I caused to be delivered by messenger service to the offices of the addressee(s).
- () **by facsimile** as follows: I caused service by facsimile. The transmission was reported as complete and without error with transmission report.
- () **by overnight mail** as follows: I caused the foregoing document to be served by overnight service.
- () **(State)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
- (X) **(Federal)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on December 4, 2007, at Long Beach, California.


Christina Doemery